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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION This Document Relates to: *Sharp Electronics Corp., et al. v. Hitachi, Ltd., et al., No. 13-cv-01173;* *Sharp Electronics Corp. v. Koninklijke Philips Elecs., N.V., No. 13-cv-2776 SC.*	Case No. 07-5944 SC **JOINT DEFENSE MOTION IN LIMINE #15 - MOTION TO EXCLUDE EVIDENCE RELATED TO A VIOLATION OF THE ANTITRUST LAWS UNDER A RULE OF REASON ANALYSIS** **ORAL ARGUMENT REQUESTED** Date: None set Time: 10:00 a.m. Place: Courtroom No. 1 Hon. Samuel Conti

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as the matter may be heard, in Courtroom 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Samuel Conti, the undersigned defendants ("Defendants") will and hereby do move the Court, under Rule 403 of the Federal Rules of Evidence, to exclude Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. (collectively, "Sharp") from introducing any evidence introducing evidence related to a violation of the antitrust laws under a rule of reason analysis for the reasons set forth in the accompanying Memorandum of Points and Authorities.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities in support thereof, the Declaration of Tiffany B. Gelott and related exhibits, the complete files and records in this action, oral argument of counsel, and such other and further matters as this Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUE

Whether Sharp should be precluded from introducing evidence related to a violation of the antitrust laws under a rule of reason at trial.

II. INTRODUCTION

The Court should exclude any evidence presented by Sharp that relates to a violation of the antitrust laws under a rule of reason analysis. Sharp's complaint alleged an express agreement among the Defendants to fix the prices of CRTs -- a *per se* violation of Section 1 of the Sherman Act. Now, however, Sharp's draft verdict forms and jury instructions show that it purports to bring an alternative claim under the antitrust rule of reason, arguing that an alleged information exchange alone had an anticompetitive effect on the market for CPTs in North America. That alternative rule-of-reason claim is nowhere in any of Sharp's three complaints, and Sharp should be precluded from introducing evidence related it.

In particular, Sharp should be precluded from introducing at trial any evidence -- including documents, testimony, and expert opinions -- that support a separate rule of reason claim based on a purported "information exchange," as opposed to evidence related to a *per se* price-fixing conspiracy. Sharp should be precluded from introducing documents related to information exchange concerning, *inter alia*, historic or future capacity or production, historic or future views of market supply or demand, anticipated launches or decisions not to launch new products, or changes to production lines. In addition, Sharp should be precluded from introducing any evidence related to any information exchanges pertaining to CDTs or to markets outside North America, because Sharp is only alleging a conspiracy to fix prices of CPTs in North America. Finally, Sharp should be precluded from introducing any evidence from its economic expert, Dr. Jerry Hausman, because Dr. Hausman's opinions relate solely to defining the relevant market and to the alleged anticompetitive effects of information exchanges, both of which are relevant only to Sharp's non-pleaded rule of reason claim.

III. ARGUMENT

A. Sharp purports to bring a rule of reason claim that it did not allege in its complaint

In all three versions of its complaint, Sharp alleged that Defendants engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act. *See, e.g.*, Sharp 2nd Am. Compl. at ¶¶ 248-54, June 13, 2014 [Dkt. No. 2030]. Thus, in paragraph 250, Sharp expressly alleged that Defendants "combined and conspired to raise, fix, maintain or stabilize the prices of CRTs sold in the United States" -- a claim of a *per se* antitrust violation. Sharp's allegations regarding the exchange of information were that Defendants "exchang[ed] competitive (*sic*) sensitive information in order to facilitate their conspiracy." Second Am. Compl. ¶ 253f.

Now, however, Sharp seeks to present evidence of an additional claim. Sharp's proposed jury instructions and verdict forms suggest that, in addition to evidencing a price-fixing conspiracy, Defendants' information exchanges *alone and by themselves* constitute an independent violation of Section 1. A claim that the exchange of competitively sensitive information itself had an anticompetitive effect on the relevant market -- separate and apart from

any price-fixing claim -- is analyzed under the rule of reason. *See Todd v. Exxon Corp.*, 275 F.3d 191, 198-99 (2d Cir. 2001) ("There is a closely related but analytically distinct type of claim, also based on § 1 of the Sherman Act, where the violation lies in the information exchange itself—as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement. This exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis.").

An "information exchange" claim is analyzed under the rule of reason because information exchanges can be procompetitive; they help firms analyze market conditions and engage in better, more efficient business planning. *See U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978) ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act.").

Per se violations and rule of reason violations are distinct antitrust claims with different pleading requirements. In order to properly allege a rule of reason violation, a Plaintiff must "identify the relevant geographic and product markets in which Plaintiffs and Defendants compete and allege facts demonstrating that Defendants' conduct has an anticompetitive effect on those markets." *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104-05 (9th Cir. 1999). By contrast, *per se* cases "do not require evidence of any actual effects on competition." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410, 1413 (9th Cir. 1991). None of Sharp's three complaints identified a relevant market or alleged that Defendants' "information exchanges" reduced competition in that relevant market.[1] As a result, Sharp failed to plead a rule of reason claim.

[1] Any rule-of reason claim in Sharp's current complaint would have been subject to dismissal for failure to state a claim; Sharp did not plead a relevant market or actual harm to competition within that relevant market. *Tanaka*, 252 F.3d at1065 (dismissing rule of reason claim for failing to allege relevant market).

B. Sharp should be precluded from introducing evidence related to a rule of reason violation that it did not plead

Because Sharp never alleged a rule of reason violation in any of the three versions of its complaint, it should be precluded from introducing evidence related to that claim at trial. *See Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 995 (9th Cir. 2009) (rejecting newly asserted claim because not pleaded in complaint); *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 257 (3d Cir. 2010) (rejecting alternative antitrust theory not pleaded in complaint because "Plaintiffs are bound by the four corners of their amended complaint").

Plaintiffs may respond that their supplemental interrogatory responses -- directed only to two Defendants -- in February 2014 put all Defendants on notice of their rule-of-reason claim. *See, e.g.*, Ex. 1 to the Declaration of Tiffany B. Gelott in Support of Joint Defense Motion In Limine #15: Motion to Exclude Evidence Related to a Violation of the Antitrust Laws Under a Rule of Reason Analysis, Plaintiffs Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc.'s First Supp. Resp. and Obj. to Defendants Hitachi Electronic Devices (USA), Inc. and Samsung SDI America, Inc.'s First Set of Interrogatories (February 26, 2014), pg. 15, Supplemental Response to Interrogatory No. 12 [redacted]. That argument fails because Sharp subsequently filed its Second Amended Complaint in June 2014, and again pleaded only a *per se* price-fixing claim. That is fatal because it is Plaintiffs' latest complaint that controls. *See Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 2000) ("[W]hen a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward" and the new complaint "wipes away prior pleadings").

Defendants would be prejudiced if Sharp's new rule-of-reason claim is allowed. Defendants have not conducted discovery on the rule of reason issue or had an opportunity to develop their defenses, and would "be forced to prepare [their] case for trial on an entirely

different factual theory of liability." *Parker v. Joe Lujan Enters, Inc*. 848 F.2d 118, 121 (9th Cir. 1988).[2]

C. Rule 403 requires exclusion of rule-of-reason evidence because the probative value is substantially outweighed by the risk of unfair prejudice

Sharp also should be precluded from introducing evidence related to its rule of reason claim under Fed. R. Evid. 403. Rule 403 requires exclusion of evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." *Nationwide Transp. Fin. v. Cass Info. Sys.*, Inc., 523 F.3d 1051, 1060 (9th Cir. 2008); *Wall Data Inc. v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 782–83 (9th Cir. 2006).

A jury could easily be misled into viewing evidence related solely to an "information exchange" as evidence of a *per se* violation. As a result, any evidence related solely to Sharp's purported "information exchange" claim under the rule of reason must be excluded. *See, e.g., Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc*., 875 F.2d 1369, 1380 (9th Cir. 1989) (excluding evidence of conduct by the defendant that was "ambiguously anticompetitive" because the jury may have been "strongly influenced" to use that evidence as a basis to form its opinion on another element of the claim).

IV. CONCLUSION

For these reasons, the Court should grant Defendants' motion and preclude Sharp from introducing evidence related to a violation of the antitrust laws under a rule of reason analysis.

Date: February 13, 2015

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[2] Nor could Defendants move to dismiss a rule of reason claim that Sharp did not plead in its complaint. *See* n.1, *supra*.

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Pursuant to Local Rule 5-1(i), the filer attests that the concurrence in the filing of this document has been obtained from each of the above signatories.